No. 90-970

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LECHMERE, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE INTERNATIONAL MASS RETAIL ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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This brief *amici curiae* of the Chamber of Commerce of the United States of America (the "Chamber") and the International Mass Retail Association ("IMRA") is filed with the consent of the parties pursuant to Rule 37.3 of the Rules of this Court.

STATEMENT OF INTEREST

The Chamber is an association comprised of 180,000 companies and business and professional organizations. As the largest federation of businesses in the United

States, the Chamber serves as the primary voice of the American business community, regularly representing the interests of its member employers in significant labor relations matters affecting those interests before this Court, the lower courts, the United States Congress, the Executive Branch and the National Labor Relations Board. Such representation is an integral aspect of the Chamber's activities. Accordingly, the Chamber has sought to promote these interests by filing briefs in a wide spectrum of significant labor relations cases.[1]

IMRA is a nonprofit trade association of mass retailers. IMRA's more than 100 retail members operate over 40,000 stores throughout the United States and generate over $150 billion in annual sales. IMRA members range in size from one-store businesses to multi-billion dollar chains operating thousands of stores throughout the nation.

The question raised in the instant case is under what circumstances nonemployee union solicitors may intrude upon an employer's private property rights in the name of promoting rights conferred upon employees pursuant to Section 7 of the National Labor Relations Act ("the Act" or "the NLRA"), 29 U.S.C. § 157 (1988).[2] The Chamber and IMRA believe that the National Labor

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[1] *E.g., Litton Financial Printing Div. v. NLRB*, No. 90-285 (U.S. filed Dec. 27, 1990); *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542 (1990); *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988).

[2] Section 7 provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Relations Board ("the Board" or "the NLRB") has once again abandoned the applicable test announced by this Court more than three decades ago in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), and instead has substituted the test the Board fashioned in *Jean Country*, 291 NLRB No. 4, 129 LRRM (BNA) 1201 (1988).

The Chamber's and IMRA's purpose in writing as *amici curiae* is in part to relay their concerns that *Jean Country* eviscerates the doctrine announced in *Babcock & Wilcox*, leaving employers' private property rights exposed to maximum infringements by union trespassers. In addition, *amici* write to stress the practical difficulties faced by employers forced to remain in a "no-man's land"[3] in which nonemployee union organizers may trespass upon employer private property while the employers are barred from obtaining injunctive relief. *Cf. Sears*, 436 U.S. at 209 (Blackmun, J., concurring) (suggesting a union's mere invocation of NLRB jurisdiction through the filing of an unfair labor practice charge is sufficient to stay a state court's hands in employer actions for injunctive relief from trespass). When viewed in light of its nonconformance with *Babcock & Wilcox* and the realities of labor disputes in which employers must defend their private property interests, it becomes plain that *Jean Country*, and the First Circuit's application of that test to the instant case, should be overruled.

SUMMARY OF ARGUMENT

Employers are faced with a Hobson's choice while unions trespass on their private property. They must either await the results of the Board's protracted and unduly complicated balancing exercise under *Jean Country* or seek relief from state courts where injunctive relief may be denied because the union has filed an unfair labor practice charge alleging improper denial of access,

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[3] *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 212 (1978) (Powell, J., concurring).

thus ousting the state court of jurisdiction.[4] In either case, the union trespassers are given ample opportunity to achieve their trespassory objectives while the employer is stymied. Reaffirmation of *Babcock & Wilcox* and its progeny, which make union access the exception rather than the rule by prohibiting such access whenever the union has alternative means to reach nonunion employees, would ease this dilemma.

I. *Side One of the Employer's Hobson's Choice*: The Board's inquiry under *Babcock & Wilcox* is relatively straightforward: can the union, through its reasonable efforts, reach employees by nontrespassory means? *Jean Country* wanders far afield from this test. First, the Board begins with an incorrect premise by equating the Section 7 rights of employees with those of nonemployees. The Board further obfuscates *Babcock & Wilcox* by failing to follow the Court's instruction to examine the existence of alternative means as a threshold—and thus usually dispositive—inquiry. Moreover, in considering alternative channels of communication, the Board improperly narrows the universe of alternative means and inquiries impermissibly into their effectiveness. Finally, the Board devalues employers' property interests by attempting to assess the strength of those interests based on such considerations as whether the employer's worksite is located in a shopping mall. The cumulative effect of the Board's departures from *Babcock & Wilcox* is that vindication of employer property interests comes, if at all, too late to be of any practical, salutary effect.

II. *Side Two of the Employer's Hobson's Choice*: One alternative an employer has is the opportunity to seek injunctive relief against trespass from state courts. However, the preemption principles enunciated in *Sears*, 436 U.S. 180, as incorrectly interpreted by the Board and unions opposing employer requests for injunctive relief

[4] *Sears*, 436 U.S. at 209 (Blackmun, J., concurring).

from state courts, can defeat employer actions to obtain preliminary relief from union trespass.[5] In fact, employers have been prosecuted for unfair labor practices merely for maintaining actions for injunctive relief in state courts.[6] *Jean Country* exacerbates the employer's difficulties in protecting its private property, placing the employer in a "no-man's land" pending the Board's time-consuming, unduly complicated resolution of a union access dispute.

Because it has failed to follow this Court's repeated and clear instructions for resolving disputes over union access to employer property, the Board is due no deference in the instant case.

BACKGROUND

Petitioner Lechmere, Inc. operates the dominant retail store in Lechmere Shopping Plaza in Newington, Connecticut. The plaza also includes thirteen other smaller shops. Newington, Connecticut is a suburb in a metropolitan area of approximately 900,000 people. *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 315 (1st Cir. 1990). In 1987, Local 919 of the United Food and Commercial Workers (the "Union"), in violation of Lechmere's strictly and uniformly enforced no-solicitation policy,

[5] *See, e.g., Cross Country Inn, Inc. v. South Cent. Dist. Council*, 50 Ohio App. 3d 8, 12, 552 N.E.2d 232, 236 (1989) (interpreting *Sears*, state court holds that in the absence of violence it is preempted from enjoining union handbilling on employer's private property where the union has filed an unfair labor practice charge with the Board encompassing the question whether the union's trespass is protected).

[6] *See, e.g., Giant Food Stores, Inc.*, 295 NLRB No. 38, 131 LRRM (BNA) 1617 (1989) (employer prosecuted by NLRB General Counsel for an unfair labor practice for maintaining a suit for injunctive relief from trespass after union filed an unfair labor practice charge).

entered the plaza's parking lot where it leafleted cars that it suspected belonged to Lechmere employees.[7] *Id.* at 316.

Lechmere management evicted these nonemployee solicitors, and did so again on two subsequent occasions when they returned. Through its use of a few of the alternative, nontrespassory communicative channels open to it, the Union obtained the names and addresses of forty-one nonsupervisory employees. 914 F.2d at 316. However, approximately one month after its organizational campaign began, the Union on July 21, 1987 filed an unfair labor practice charge with the NLRB, seeking access to Lechmere's private property to continue its solicitation activities. *Id.* at 317. The Board issued a complaint on November 18, 1987, and a hearing before an administrative law judge ("ALJ") followed. *Lechmere, Inc.*, 295 NLRB No. 15, attached ALJ's slip op. at 1 (Sept. 30, 1988). Applying the criteria of *Fairmont Hotel Co.*,[8] a kindred precursor to *Jean Country*, the ALJ concluded that Lechmere violated Section 8(a)(1) of the Act by refusing the Union access to its parking lots to conduct organizational activity. 914 F.2d at 317. The ALJ reached this conclusion notwithstanding his finding that "there were adequate [nontrespassory] alternate means of contacting the employees available to the Union." *Lechmere*, 295 NLRB No. 15, attached ALJ's slip op. at 9-10.

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[7] The record below reflects that the Union's solicitation was not limited to leafleting. Petitioner proffered evidence that the Union's representatives repeatedly entered Lechmere's store, and once inside, confronted employees, distributed literature, placed literature in merchandise and in store rest rooms, and entered restricted areas. *See* Respondent's Brief in Support of Exceptions, No. 39-CA-3571, at 10 (NLRB, filed Dec. 2, 1988); Brief for the Petitioner Lechmere, Inc., No. 89-1683, at 13 (1st Cir., filed Oct. 13, 1989).

[8] *See* 282 NLRB 139 (1986).

The Board[9] and the United States Court of Appeals for the First Circuit,[10] each applying *Jean Country*, upheld the ALJ's finding of a violation, although both found, *contrary to the ALJ*, that the Union did not have adequate alternative means for reaching Lechmere's employees.

I. *JEAN COUNTRY* MATERIALLY ALTERS *BABCOCK & WILCOX* AND THEREBY FRUSTRATES EMPLOYERS' EFFORTS TO VINDICATE THEIR PROPERTY INTERESTS IN A TIMELY MANNER.

The crux of the *Jean Country* test is the weighing of three factors—the employer property rights, the union derivative Section 7 rights, and the availability of "effective" alternative means. 129 LRRM at 1205. The Board's stated aim in analyzing these factors is to determine "the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted." *Id.* However, the interplay of these factors has resulted in a skew in favor of union access that is inconsistent with this Court's clear precedent.[11] Fur-

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[9] *See* 295 NLRB No. 15, 131 LRRM (BNA) 1480 (1989).

[10] *See* 914 F.2d 313.

[11] The overwhelming number of reported access cases decided by the Board under *Jean Country* reach results in favor of the union's right of access. *See, e.g., Sparks Nugget, Inc.*, 298 NLRB No. 69, 134 LRRM (BNA) 1121 (1990); *Little & Co.*, 296 NLRB No. 89, 132 LRRM (BNA) 1173 (1989); *Sentry Markets, Inc.*, 296 NLRB No. 5, 132 LRRM (BNA) 1001 (1989), enforced, 914 F.2d 113 (7th Cir. 1990); *Mayer Group, Inc.*, 296 NLRB No. 9, 132 LRRM (BNA) 1005 (1989); *Wylie Const. Co.*, 295 NLRB No. 119, 132 LRRM (BNA) 1007 (1989); *Subbiondo & Assocs., Inc.*, 295 NLRB No. 132, 132 LRRM (BNA) 1006 (1989); *Granco, Inc.*, 294 NLRB No. 7, 131 LRRM (BNA) 1325 (1989); *Trident Seafoods Corp.*, 293 NLRB No. 125, 131 LRRM (BNA) 1247 (1989); *Dolgin's, A Best Co.*, 293 NLRB No. 102, 131 LRRM (BNA) 1159 (1989); *Target Stores*, 292 NLRB No. 93, 130 LRRM (BNA) 1331

thermore, the incremental impact of each factor added by the Board is a commensurately longer delay in finally resolving an access dispute, a delay that has the practical effect of nullifying employer private property rights.

A. Despite The Express Distinction Drawn In *Babcock & Wilcox*, The Board Continues To Confuse The Section 7 Rights Of Employees With Those Of Nonemployees.

In *Jean Country* and in the case at bar, the Board once again ignored the essential distinction between employee and nonemployee union organizers' Section 7 rights, in effect treating them as one and the same. The First Circuit uncritically adopted the Board's blurring of these categorical rights, finding that "[a]lthough the Section 7 right is the workers' right, not the union's right, unions and their agents, derivatively, enjoy the protection of Section 7." 914 F.2d at 318. Thus, the Board and the First Circuit began with an erroneous premise.

Employers have long understood that " 'time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property.' " *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (citation omitted). Thus, employees enjoy considerably greater latitude to conduct persuasive activities for or against unions on their employers' property. The Board ignored this principle in *Babcock & Wilcox* when it attempted to treat interchangeably the Section 7 rights of employees and those of nonemployee union organizers. This Court, however, found the distinction between these two sets of rights to be "*one of substance.*" 351 U.S. at 113 (emphasis added). While the Court stated that employees' exercise of their Section 7 rights is dependent "in some measure" on the flow of information from nonemployee union organizers, *see Babcock & Wilcox*, 351 U.S. at 113, it did not hold that the employees' and nonemployees' rights are the same. To the contrary, the Court was swift to qualify the ancillary role of nonemployees: "[I]f the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property." 351 U.S. at 113. *Babcock & Wilcox* affords nonemployees no greater access rights than this.[12] The Board's continued misapprehension of whose rights are at issue in access cases explains in large measure its propensity to shun the relatively clear rule of *Babcock & Wilcox*.

(1989); *Mountain Country Food Store, Inc.*, 292 NLRB No. 100, 130 LRRM (BNA) 1329 (1989); *Sahara Tahoe Corp.*, 292 NLRB No. 86, 131 LRRM (BNA) 1021 (1989); *W.S. Butterfield Theatres, Inc.*, 292 NLRB No. 8, 130 LRRM (BNA) 1113 (1988).

B. *Jean Country* Misplaces The Alternative Means Factor Held To Be A Threshold Inquiry In *Babcock & Wilcox* And Its Progeny.

In *Jean Country*, the Board belatedly recognized that it must consider the existence of alternative means in *every* union access case. *See* 129 LRRM at 1203.[13] How-

[12] The breadth of the stranger-union's rights bears little resemblance to that of employees and even less to those of the employer, who may conduct anti-union activities on his property without yielding time to employees to conduct pro-union solicitation. *NLRB v. United Steelworkers of America ("Nutone")*, 357 U.S. 357, 364 (1958).

[13] In *Jean Country*'s precursor, *Fairmont Hotel*, the Board concluded that it would only consider alternative means if the union's Section 7 interests and the employer's private property interests are relatively equal in strength. *See* 282 NLRB at 142. As the Board later reflected in *Jean Country*, it was concerned that "making access decisions turn on the presence or absence of alternative means of communication could result in allowing access for the exercise of core Section 7 rights . . . less readily than for less central rights, such as area standards activity." 129 LRRM at 1204. The Board was correct that area standards activity is less central to Section 7 than organizational activity. *See Eastex, Inc. v. NLRB*,

ever, the Board, contrary to *Babcock & Wilcox*, has again avoided making that inquiry a *threshold*—and thus potentially dispositive—question. Instead, *Jean Country* considers alternative means along side other factors such as the nature of the Section 7 and private property interests asserted. This approach strays far afield from *Babcock & Wilcox* and its progeny. The Court in *Babcock & Wilcox* could not have been clearer that the threshold inquiry is whether the union has available alternative means of communicating with employees: "The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization *when other means are readily available.*" 351 U.S. at 113-14 (emphasis added). Absent proof that other means are nonexistent, the Board's inquiry is terminated.

This Court has repeatedly reaffirmed *Babcock & Wilcox*, each time declining to abandon that case's maxim that the existence of alternative means to communicate with employees obviates union access to employer private property. In *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the Court declined to apply first amendment principles to analyze union solicitors' right of access to employer private property. Significantly, the Court reemphasized that under *Babcock & Wilcox* the employer's property rights would only be required to yield to organization rights "[*a*]*fter the requisite need for access to the employer's property has been shown . . . .*" *Id.* at 545 (emphasis added).[14]

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437 U.S. 556, 583 n.3 (1978) (Rehnquist, J., dissenting). What the Board should have recognized foremost, however, is that "[e]ven on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, it would be unprotected in most instances." *Sears*, 436 U.S. at 206 (footnote omitted).

[14] Although dissenting in *Central Hardware*, Justice Marshall shared the view that *Babcock & Wilcox* controlled and that that case's balancing of the employer's property rights and the union's right of access occurs only "where a union has *no other means* at its disposal to communicate with employees other than to use the employer's property . . . ." 407 U.S. at 548 (Marshall, J., dissenting) (emphasis added).

This Court again declined to alter the *Babcock & Wilcox* doctrine in *Hudgens v. NLRB*, 424 U.S. 507 (1976). There, the Board perpetuated its error of analyzing union trespassers' right of access to private property under first amendment principles, urging that the public character of Hudgens' shopping mall could be analogized to a business block of the company town held to be subject to first amendment constraints in *Marsh v. Alabama*, 326 U.S. 501 (1946). In reaffirming that *Babcock & Wilcox*—and not first amendment principles—would govern union access disputes, the Court described *Babcock & Wilcox* as "a case which held that union organizers who seek to solicit for union membership may intrude on an employer's private property *if no alternative means exist for communicating with the employees.*" 424 U.S. at 511 (emphasis added).

Finally, in *Sears*, 436 U.S. 180, the Court explained that its decision to permit state courts to enjoin union trespassory activity arguably protected by Section 7 would not derogate from the Board's exclusive jurisdiction because:

> While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. *To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists . . . .* That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* ac-

commodation principle has rarely been in favor of trespassory organizational activity.

Id. at 205 (footnotes omitted and emphasis added).

In sum, the dictates of this Court regarding union organizers' right of access to employer private property clearly demonstrate that the finding of alternative means should mark the terminal point of the Board's inquiry because the burden on the union "of showing that no other reasonable means of communicating its organizational message to the employees exists" is a "heavy" devoir. *See Sears*, 436 U.S. at 205.[15]

C. *Jean Country*'s View Of Alternative Means Distorts *Babcock & Wilcox*.

In addition to misplacing the question of alternative means on a par with other factors which do not constitute threshold inquiries, *Jean Country* transforms the alternative means inquiry into a question of whether *effective* alternative means exist. Indeed, the Board has determined that it will consider "most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the [Union's] message." *Jean Country*, 129 LRRM at 1205. Here again, the Board is injecting a fact-laden variable which impedes the needed swift resolution of union access disputes. More importantly, the Board is attempting to revisit arguments which this Court expressly rejected in *Babcock & Wilcox*. In *Babcock & Wilcox*, "[t]he Board viewed the place of work as *so much more effective a place for communication of information* that it held the employer guilty of an unfair labor practice for refusing limited access to company property to union organizers." 351 U.S. at 107-08 (emphasis added). The Court rejected arguments regarding the relative effectiveness of the available channels of communication and held that so long as the nontrespassory means of communication could *reach* employees, union organizers had no right of access to employers' property. *Id.* at 112.

[15] To the extent that *dicta* in *Hudgens* concerning a "spectrum" of Section 7 and private property rights invites a more multifaceted analysis than the determination of the existence of alternative means, it is not at all inconsistent with *Babcock & Wilcox*. An examination of the nature and strength of the respective rights at issue may at times be necessary—*if the union lacks alternative means for communicating its message to employees*. Where such means are available, however, the nonemployee union organizers have no right to use the employers' property in servitude of their proselytizing activities—no matter what the nature of the rights they assert. *See* Note, *Labor Law—Employees' Right to Organize*, 104 Harv. L. Rev. 1407, 1411 (1991).

Equally as unwarranted as its inquiry into effectiveness is the Board's attempt to pare the universe of alternative channels of communication available to the union. In *Jean Country*, as well as the case at bar, the Board mistakenly concluded that certain alternative means of communication were beyond the Union's fiscal reach and altogether ignored other means of communication that the Union failed to employ. For instance, although *Babcock & Wilcox* itself recognized "advertised meetings" as a usual channel of communication, *see* 351 U.S. at 111, there is no indication that the Union in the instant case planned, advertised or held any such meetings. The Lechmere employee who returned his union membership card might have been enlisted to advertise meetings, not only on Lechmere's property, but in nonworking areas of Lechmere's store. *See Republic Aviation*, 324 U.S. at 803 n.10. Indeed, this pro-union employee and others he and the Union might enlist could have served as conduits for other Union organizational messages.

By foreclosing these and other communicative alternatives,[16] the Board and the First Circuit shifted the analytical emphasis away from alternative means and onto

[16] It bears mentioning, for instance, that the Union voluntarily ceased picketing Lechmere on public property and also chose to abandon its use of the public area near an apron. 914 F.2d at 317.

less clear-cut factors such as the nature and strength of the respective rights asserted. The obvious result is an unwarranted protraction of the resolution of the dispute over access.

D. *Jean Country* Devalues Employers' Property Interests.

Under the Board's *Jean Country* analysis, certain employer property interests are accorded less protection than others. Specifically, the Board examines the "quasi-public characteristics" of the employer's property to determine the nature and strength of the employer's property interest, according employers with more "quasi-public" worksites less protection. *See Jean Country*, 129 LRRM at 1207. Thus, each union access case invites a fact-intensive inquiry into such matters as the number of stores located on a given piece of property, the number of customers that enter the property, and the extent to which an employer's property resembles a public street or business block. *See id.* This Court, however, has prescribed a far more narrow analysis.

The Board's attempts to highlight the "quasi-public" features of employers' property as a means of justifying union access to such property is a tiresome echo of arguments previously rejected by this Court. In *Hudgens*, 424 U.S. 507, the Court unequivocally repudiated the doctrine of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), that where the employer's property "serves as the community business block and is freely accessible and open to the people in the area and those passing through," union members have a first amendment right to utilize those premises to express their views. *Id.* at 319 (quotation omitted).

Yet the Board attempts to revive the very same "community business block" rationale overruled in *Hudgens*, this time describing its approach as an examination of the "quasi-public characteristics" of the employers' property. The Board's disregard of this Court's clear instructions is manifest. And equally evident is the lethargic impact that consideration of "quasi-public" traits has on the swift resolution of access disputes. In light of *Hudgens*, there is nothing to suggest that employers whose businesses are located in shopping malls or similar complexes should be subject to a more prolonged process of scrutiny by the Board—and ultimately accorded less protection—due to the happenstance of being situated in a mall.[17]

II. IN LIGHT OF PREEMPTION PRINCIPLES, *JEAN COUNTRY* DRAMATICALLY REDUCES EMPLOYERS' PROSPECTS OF OBTAINING MEANINGFUL VINDICATION OF THEIR PRIVATE PROPERTY INTERESTS.

A. Justice Powell's Fears That Employers Would Be Foreclosed From Interim Relief From Union Trespassing Have Been Realized.

In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 197, 207 (1978), the Court held that the NLRA did not preempt a California state court's issuance of an injunction against a union's trespassory "area standards" picketing because the

[17] By attempting allusively to resurrect the constitutional arguments previously rejected by this Court, the Board urges an interpretation of Section 7 of the Act that may render that section constitutionally infirm. Compelling an employer to allow union trespassers access to private property in order to promote unionism burdens the employer's first and fifth amendment rights. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (requiring government to offer a compelling interest to justify forcing citizens to use their private property to promote a message with which they disagree); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (requiring that government regulations granting public access to private property "substantially advance" legitimate state interests). By allowing the stranger-union access to employer property only in truly exceptional circumstances, the Court wisely adheres to the longstanding rule of statutory construction that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

controversy presented to the state court was not identical to the controversy that could be presented to the NLRB and the union had not invoked the jurisdiction of the Board by filing an unfair labor practice charge. Some of the Justices differed in their understanding of the Court's precise holding. Justice Blackmun, in a separate concurrence, maintained that "the logical corollary of the Court's reasoning is that if the union *does* file a charge upon being asked by the employer to leave the employer's property and continues to process the charge expeditiously, state-court jurisdiction is pre-empted until such time as the General Counsel declines to issue a complaint or the Board, applying the standards of *NLRB v. Babcock & Wilcox Co.* . . . rules against the union and holds the picketing to be unprotected." *Id.* at 209 (Blackmun, J., concurring) (emphasis in original).

Justice Blackmun's interpretation of the majority's opinion prompted Justice Powell to write separately. Justice Powell forewarned that to the extent the Court's decision to uphold the state court's jurisdiction to issue an injunction turned on the fact that the union had not filed an unfair labor practice charge, the Court invited a situation "where there is no forum to which the parties may turn for orderly interim relief in the face of a potentially explosive situation." *Id.* at 213 (Powell, J., concurring). Such a result would follow because, assuming union organizers avail themselves of the protective cloak provided by filing an unfair labor practice charge, the NLRB General Counsel's decision whether to issue a complaint "may take weeks" and the Board itself lacks the authority to grant or obtain preliminary relief from the courts. *Id.* In the meantime, if the state court must stay its hand due to the pendency of an unfair labor practice charge, the employer is without any remedy other than self-help and its attendant potential for violence.

According to Justice Powell, it is no answer to the above "no-man's land" scenario that the preemption doc-

trine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), does not preclude state courts from enjoining violent picketing. "Trespass upon private property by pickets, to a greater degree than isolated trespass, is usually organized, sustained, and sometimes obstructive—*without initial violence*—of the target business and annoying to members of the public who wish to patronize that business. The 'danger of violence' is inherent in many—though certainly not all—situations of sustained trespassory picketing." *Sears*, 436 U.S. at 212-13 (emphasis added).

In light of the Board's inability to grant preliminary relief to the employer and the insidious character of sustained, organized picketing, Justice Powell rejected Justice Blackmun's interpretation of the majority decision. *Id.* at 214.[18] Justice Powell stated that he would not have joined the Court's opinion if it could be fairly construed to hold as Justice Blackmun perceived. As it turns out, however, the NLRB has caused Justice Powell's worst fears to be realized, and the overlay of the Board's latest *Jean Country* test only exacerbates the problem of the "no-man's land" that Justice Powell foresaw.

The interpretation of *Sears* against which Justice Powell cautioned has, at the urging of unions seeking access to private property, become the view of many state courts.[19]

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[18] Normally, an employer can obtain no relief from the NLRB against union trespass. Union trespass does not constitute an unfair labor practice as long as the trespass is not accompanied by other union unfair labor practices such as restraint and coercion of employees, secondary boycotting or recognitional picketing after thirty days without an election petition being filed.

[19] *See, e.g., Brown Jug, Inc. v. International Broth. of Teamsters, Local 959*, 688 P.2d 932, 937 (Alaska 1984) ("[W]here . . . a union does not submit the question to the NLRB, Alaska courts have jurisdiction"); *Cross Country Inn, Inc. v. South Cent. Dist. Council*, 50 Ohio App. 3d 8, 12, 552 N.E.2d 232, 236 (1989) ("In *Sears*, the

More importantly, the Board itself has advanced the position that state courts are deprived of jurisdiction upon the filing of a charge by a union. For instance, in a case litigated in the Northern District of Georgia,[20] the Board petitioned the court to vacate a state court injunction prohibiting union solicitation on the premises of the Peachtree Center, privately-owned commercial property.[21] The Board argued to the court:

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Supreme Court found the assertion of state court jurisdiction to be appropriate because it did 'not create a significant risk of prohibition of protected conduct' . . . since the union had failed to invoke the jurisdiction of the National Labor Relations Board and the employer, Sears, had no right to do so"); *Shirley v. Retail Store Employees Union*, 225 Kan. 470, 592 P.2d 433, 437 (1979) ("If . . . a union, after receiving from the employer or property owner a notice to cease picketing, files a complaint with the NLRB and the board takes jurisdiction, a Kansas district court has the power to enjoin trespassory picketing only where there is shown to be actual violence or a threat of immediate violence or some obstruction to the free use of property by the public that immediately threatens public health and safety or that denies to an employer or his customers reasonable ingress and egress to and from the employer's place of business"); *Saginaw Joint Venture v. Retail Store Employees Union Local 40*, 413 Mich. 955, 322 N.W.2d 172, 173 (1982) ("The authority of state courts to enjoin activities arguably protected or prohibited by sections 7 and 8 of the [NLRA] was pre-empted by the proceedings before the [NLRB]"); *Smitty's Super Markets, Inc. v. Retail Store Employees Local 322*, 637 S.W.2d 148, 154 (Mo. Ct. App. 1982) (state court to stay its hand until Board action taken but may thereafter act if it is concluded that the union trespassing activity was not protected); *PTA Sales, Inc. v. Retail Clerks Local No. 462*, 96 N.M. 581, 633 P.2d 689, 692 (1981). The Chamber and IMRA believe that the Board and the aforementioned state courts have misinterpreted *Sears* and that Justice Powell correctly states that the filing of a charge should not be dispositive of the preemption question.

[20] *See NLRB v. Peachtree Center Management Co.*, No. 1:88-CV-1888 (N.D. Ga., filed Aug. 29, 1988).

[21] *See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (Board possesses implied authority to enjoin state action "where its federal power pre-empts the field").

In the instant case, the Union has filed an unfair labor practice charge and a complaint has issued against PCMC, thus invoking the Board's jurisdiction. In contrast with *Sears*, it is clear that PCMC will be afforded Board resolution of whether the Union has a federal right to orderly and peaceful access to Peachtree Center premises. Under these circumstances the Supreme Court has recognized that the Board is the appropriate body to accommodate the conflicting interests at hand, not the state court.

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As is evident, the conduct at issue before the Board is the very same conduct being regulated by the Superior Court of Fulton County. The Board will be determining whether the Labor Act protects the Union's solicitation on Peachtree Center premises notwithstanding the trespass. The state court, by issuing a restraining order against the Union's peaceful entry onto Peachtree Center, has inappropriately acted upon conduct which is arguably protected under the Labor Act and within the Board's exclusive jurisdiction.

Memorandum in Support of Plaintiff's Amended Motion for a Preliminary Injunction, No. 1:88-CV-1888, at 13, 11 (filed Sept. 15, 1988) (Lodged with Supreme Court of United States on May 9, 1991).[22]

[22] The district court denied the NLRB's motion for a preliminary injunction. (Order, April 7, 1989). Thereafter, upon motion by the Board, the court allowed the Board to withdraw its complaint without prejudice. (Order, July 3, 1989). Despite the Board's defeat in this case, however, there is no indication that its policy or its overly restrictive view of *Sears* has changed. *See infra* note 25 and accompanying text. The district court orders of April 7, 1989 and July 3, 1989 were also lodged with this Court on May 9, 1991.

Thus, employers often must seek to protect their private property rights under circumstances where interim relief is not available because of the interpretation given *Sears* by state courts and the NLRB. In this context, adherence to the relatively straightforward test of *Babcock & Wilcox*, including its threshold requirement that unions bear their burden of proving the absence of alternative means, becomes critical if employers are to receive timely and meaningful vindication of their legitimate property interests.

B. *Jean Country* Sacrifices Employers' Property Interests.

Justice Blackmun observed in *Sears* with respect to the union's Section 7 rights that "[l]abor disputes are frequently short lived, and a temporary restraining order issued upon *ex parte* application may, if in error, render the eventual finding of § 7 protection a hollow vindication." 436 U.S. at 212 (Blackmun, J., concurring). Likewise, the normally short life of a labor dispute may render moot vindication of employers' property rights when the process for protection of those interests is one which may take from many months to years.[23] If the

[23] The Board's most recent data indicate that the median time taken to decide whether to begin an unfair labor practice proceeding by issuing a complaint or dismissing a union's charge is forty-six days. *See 53rd Annual Report of the National Labor Relations Board* (CCH) (1988), p. 248. Another one hundred and twenty-seven days elapse between the issuance of a complaint and the close of a hearing before an ALJ. The ALJ then takes a median of 139 days to issue his or her decision. Thereafter, the Board takes an additional 395 days to issue its decision. Thus, it takes a staggering total of 761 days in a typical case for an employer to vindicate its property interests through the full Board procedures. *Id.* Lechmere's case is as good an example as any. The Union filed its charges on July 21, 1987. An ALJ issued his opinion on September 30, 1988, and the Board issued its decision on June 15, 1989. 914 F.2d at 317; 131 LRRM at 1480. Given this delay, *Jean Country* is particularly unsuited to protection of employers' property interests because its unduly complicated analysis frustrates efficient resolution of union access disputes.

Board and the NLRB General Counsel, as mandated by *Babcock & Wilcox* and its progeny, adhered to the principle that access would be the exception rather than the rule and examined as a threshold matter only whether the union had met its burden of proving that alternative channels of communication were not open to it, employers would stand a much better chance of vindicating their rights while such vindication is still meaningful to them. *Jean Country*, however, completely thwarts this objective.[24]

First, where the criteria are as nebulous and complicated as *Jean Country* prescribes, it is difficult for the General Counsel, in the exercise of prosecutorial discretion, to dismiss a charge outright. The court of appeals in this case described the *Jean Country* paradigm as follows: "[T]he Board . . . must gather the three interdependent bundles of facts . . . [—] strength of employees' Section 7 right, strength of employer's property right, availability and efficacy of alternative means of communication—tie them together, and weigh them in the aggregate." *Lechmere*, 914 F.2d at 321. This factual and legal conundrum gives the General Counsel substantial incentive to issue a complaint rather than to dismiss a union's access charge. That is because the *Jean Country* test is so fact-laden and obscure that the General Counsel is more likely to conclude that the issue is one more properly placed before a trier-of-fact—the ALJ—and ultimately the Board and the courts.

Second, even assuming that a charge in some cases will not result in issuance of a complaint, the *Jean Country* test inevitably prolongs the amount of time necessary to investigate the charge. Under *Babcock & Wilcox* and its progeny, properly construed, the General

[24] It is, of course, no answer to the employer's dilemma that it may sue a union whose trespassory activity is ultimately found unprotected by the Board. It is, to say the least, difficult to quantify the damages caused by trespassory organizational activity—particularly where the union succeeds in its trespassory objectives.

Counsel should first inquire whether the union had alternative means of communication available to it. Unless the union, which bears the burden of proving the need for access, can demonstrate the lack of such alternative channels, the General Counsel's inquiry is ended. Certainly the factual investigation under the appropriate *Babcock & Wilcox* standard is less arduous and time-consuming than under *Jean Country*, where alternative means must be considered along with three or four other variables. While the General Counsel and the Board are bundling and weighing, however, the employer's property interests are irreparably harmed because vindication of such rights after the union, through trespassory means, has achieved—or substantially achieved—its organizational objective is equivalent to no vindication at all.

C. The General Counsel And The Board Have Discouraged Employers From Seeking State Court Injunctive Relief, Thus Fostering Employer Reliance On The Ineffective *Jean Country* Test.

The problems employers face in vindicating their private property rights do not stop at the interplay of *Sears* and *Jean Country* or the potential dismissal of their state court trespass actions. Employers may also face prosecution by the NLRB General Counsel. The General Counsel has taken the prosecutorial position—one that the Board has apparently not rejected—that an employer's maintenance of a state court action for injunctive relief from union trespass after the union has filed an unfair labor practice charge may constitute an independent violation of Section 8(a)(1) of the NLRA. *See, e.g., Giant Food Stores, Inc.*, 295 NLRB No. 38, 131 LRRM (BNA) 1617, 1620 (1989).

In *Giant Food*, nonemployee union members trespassed upon premises leased by Giant in order to engage in area standards picketing and handbilling against that employer. Giant filed a civil suit in Pennsylvania state court requesting that the court enjoin the union's tres-

pass. The union responded by filing an unfair labor practice charge alleging that under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the employer's suit was baseless and intended to curtail the union's exercise of its Section 7 rights. The employer continued to maintain its suit after the charge was filed. The state court held, *inter alia*, that under *Sears* state court jurisdiction was preempted because the union had filed an unfair labor practice charge. The court therefore denied Giant's request for injunctive relief. Giant appealed the latter ruling.

While Giant's state court appeal was pending, an NLRB administrative law judge held hearings on the union's charge. During the proceeding before the ALJ—and thereafter, before the Board—"[t]he General Counsel . . . [took] the position that after the Union filed an unfair labor practice charge, the state court's jurisdiction was preempted and, therefore, [Giant's] maintenance of the suit after that date violated the Act." 131 LRRM at 1621.[25] The ALJ noted that Pennsylvania courts had not resolved "the question of when preemption of state court subject matter jurisdiction occurs upon the filing of a charge." 295 NLRB No. 38, attached ALJ slip op. at 18 (July 17, 1986). Taking the latter fact into account as well as the disputed interpretations of *Sears* among this Court's Justices, the ALJ held that Giant's suit was not baseless within the meaning of *Bill Johnson's*.

While agreeing with the ALJ that the union's complaint regarding preemption should, for the time being, be dismissed, the Board "retain[ed] jurisdiction over this com-

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[25] In a subsequent motion for reconsideration, the General Counsel stated its position in even clearer terms, contending, in the words of the Board, that "the maintenance of a retaliatory lawsuit in state court is an unfair labor practice *whenever* that state court lawsuit is pre-empted by the National Labor Relations Act." 298 NLRB No. 50, 134 LRRM (BNA) 1117, 1118 (1990) (emphasis added).

plaint allegation for further consideration on prompt notification by any party of a final, binding determination or resolution of the merits by the Commonwealth of Pennsylvania." 131 LRRM at 1621. In so doing, the Board apparently left open the issue of whether the employer, if it was unsuccessful in state court, did violate Section 8(a)(1). *See also American Pacific Concrete Pipe Co.*, 292 NLRB No. 133, 130 LRRM (BNA) 1501, 1503 (1989) (according to the Board, "[t]he implication [of footnote five in *Bill Johnson's*] is that the Board, in determining whether or not the filing of preempted state court suits is violative of the Act, may hold that an employer who sues an employee for a retaliatory motive is guilty of a violation of the Act").

Whether the General Counsel is right or wrong that an employer may not maintain a suit for injunctive relief once an unfair labor practice charge has been filed, the reality is that the General Counsel has sought to make it more difficult and costly for employers to turn to state courts for injunctive relief against union trespass, and to pursue appeal rights they may have in the state court system. Employers must roll the dice—either forego actions to vindicate their property interests in state court, or be prosecuted by the NLRB General Counsel for violating federal labor law.[26] *Giant Food* is merely one example of the barriers employers face. At the same time, the Board has made state court relief increasingly necessary because *Jean Country* creates an analytical vortex that renders the Board incapable of vindicating employers' private property rights in a timely—and thus meaningful—fashion. Thus, the employer's "no-man's land" widens, leaving unions with an even greater oppor-

[26] The next step in this still unfolding illogical conundrum, if the Board ultimately adopts the General Counsel's position, could be Board petitions in federal district court under Section 10(j) of the Act to enjoin employers from maintaining state court trespass actions after issuance of an unfair labor practice complaint by the NLRB General Counsel.

tunity to achieve their trespassory objectives pending resolution of the access dispute.

D. The Board Is Due No Deference.

Because the Board has failed repeatedly to follow the Court's *Babcock & Wilcox* standard and because the Board has adopted a test that maximizes the harm to private property rights, it follows that the Board is entitled to no deference in the present case. The Board is not free, on the assumption that this Court will defer, to discard the Court's well-established precedent; the Court appropriately reviews whether the Board has acted consistently with its prior cases. *See NLRB v. International Longshoremen's Ass'n AFL-CIO*, 473 U.S. 61, 78-79 (1985).

Moreover, the instant case is one in which a cardinal premise for deferring to the Board—its expertise in assessing industrial reality[27]—simply does not apply. On the one hand, the Board argues for "industrial reality" which guards its exclusive jurisdiction to the point where a state court is powerless to act—except in violent or obstructive situations—pending the resolution of an unfair labor practice charge. *See, e.g., Peachtree Center*, No. 1:88-CV-1888. On the other hand, the Board has adopted a test, *Jean Country*, which predictably moves much too slowly to protect the same property interests that the Board desires the state courts to refrain from protecting. This is not industrial expertise and this is not industrial reality. The Board, like any other agency, must be made to follow the precedents of this Court. This is especially imperative where its failure to do so invites trespass and renders unprotected rights as essential as private property rights.

[27] *See NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990).

CONCLUSION

For the above reasons, the judgment of the First Circuit should be reversed.

Respectfully submitted,

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